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THE DOCTRINE OF THE UNITED STATES SUPREME COURT OF PROPERTY AFFECTED BY A PUBLIC INTEREST, AND ITS TENDENCIES.*

JOHN A. PORTER PRIZE ESSAY.

The student of law who undertakes to examine the decision of the Supreme Court of the United States in *Munn v. Illinois*, 94 U. S. 113, and to discuss its tendencies, must possess more than the ordinary amount of that assurance which is supposed to accompany ignorance if he does not feel hesitation in analyzing and diffidence in expressing his conclusions upon this difficult and important question.

His examination of the authorities to which he is accustomed to turn for sure guidance in complicated and far-reaching matters leaves him in doubt whether language of cautious generality should be interpreted as giving a hesitating support to, or as veiling a respectful dissent from, the principles upon which this decision is based. For the questions involved are much more than mere legal ones turning upon the application of generally conceded legal principles, or the construction of doubtful phrases. They put in issue the deep underlying matters of political economy which are agitating the whole civilized world of our day.

The gist of the decision is an endeavor to give to the indefinite economic ideas of the present time the support of definite legal principles; or, in other words, to attempt to give to these definite legal principles a force and extent which, in the minds of many experienced jurists, they cannot be made legitimately to sustain. Hence the doubt and dissent with which the decision has been received. And in face of this uncertainty of the

**Munn v. Illinois*, Etc.

leaders of the legal profession, the student must feel that, in entering upon a discussion of this subject, he is affording a new illustration of the saying that fools step in where angels fear to tread.

To begin with, it will be well to recall briefly the circumstances of the case.

Munn, a citizen of Illinois, owned and conducted a grain elevator in Chicago. The Constitution of the State having declared the business to be a public one, the Legislature passed a statute for its regulation. This statute required any one in that business to procure a license and give a bond; it also fixed a penalty for failure to comply with these regulations, and required publication of the rate of charges for each ensuing year, and established a maximum charge.

Munn, whose business was in active operation before the passage of this statute, failed to comply with its regulations, and was fined for his failure. He appealed to the Supreme Court of Illinois against the conviction, and, the conviction being affirmed, he sued out a writ of error in the Supreme Court of the United States.

His claim was that the sections of the statute containing the above-mentioned regulations were unconstitutional and void, and that they were repugnant to the Fourteenth Amendment to the Constitution of the United States, which ordains that "No State shall deprive any person of life, liberty, or property, without due process of law."

The question thus squarely presented for the decision of the Supreme Court of the United States was this: Can the Legislature of a State, putting in force a declaration in its constitution that a certain business, heretofore a private one, is a public one and subject to legislative control, compel the owner of such a business, established before the adoption of the State Constitution, to submit to have his charges regulated by the Legislature? Did the Fourteenth Amendment afford him protection in these circumstances?

The majority of the Supreme Court decided that the statute in question was constitutional, and that it did not violate the Fourteenth Amendment.

The opinion delivered by Chief Justice Waite argued as follows: The provision against deprivation as a limitation on the power of States is old; it is found in Magna Charta, and substantially in nearly all the State Constitutions. It was introduced into the Constitution of the United States by the Fifth Amend-

ment, and by the Fourteenth, as a guarantee against State encroachment. A member of a body politic necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. This does not confer upon the whole people power to control rights exclusively private, but it does authorize laws requiring each citizen to so use his property as not unnecessarily to injure another. This is the very essence of government, and is the source of the Police Powers. Under these powers the Government regulates the manner of using property when necessary to do so for the public good. Under this power it has always been customary in England and in this country to fix rates of charges for ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc. This has never been said to come within the constitutional prohibition against interference with private property. Hence it is apparent that down to the adoption of the Fourteenth Amendment it was not supposed that statutes regulating the use or even the price of the use of private property necessarily (although they may sometimes) deprived an owner without due process of law.

As to the principles upon which the power of regulating rests, the opinion argues that the common law, whence came the right which the Constitution protects, rules that when private property is "affected with a public interest, it ceases to be *juris privati* only," as was said by Lord Hale in *De Portibus Maris*, 1 Harg. Law Tracts, 78.

The Court then continues: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

The opinion then argues that the grain elevator business in Chicago was a virtual monopoly, and was, therefore, by that, clothed with a public interest and ceased to be *juris privati*. "It might not have been made so by the statute of Illinois, but it was made so by the facts." It was immaterial that no precedent could be found for a statute precisely like this, as the facts showed a new development of commercial progress, and the statute simply extends the law to meet it. Nor did it matter that the

owner's business was started before the regulations were adopted, as he was from the beginning subject to the power of the body politic to require him to conform to regulations established for the public good.

As to an owner's right to a reasonable compensation, and as to whether it is for the Legislature or the judiciary to decide as to reasonableness, the opinion says that in common law countries it is customary for the Legislature to declare a maximum, beyond which any charge made would be unreasonable. In private contracts the reasonableness is judicially determined, because the Legislature has no control over such contracts.

"The controlling fact is the power to regulate at all, and where that exists the right to establish a maximum of charge, as one of the means of regulation, is implied."

To sum up the material points of the above argument, it would appear:

That the admitted limitation of the power of deprivation by the State is itself limited by the duty of the citizen, as a member of the body politic, to so use his property as not unnecessarily to injure others. This duty of the citizen the State has a right to enforce by the Police Powers, and such exercise, in certain specified cases, has been unresisted from all time.

That this power of regulation is derived from the common law, and is properly exercised over private property when affected with a public interest.

That such public interest does arise whenever one devotes his property to a use in which the public has an interest.

That this business was a virtual monopoly, and this notwithstanding its vast importance, and, therefore, it was clothed with a public interest, ceased to be *juris privati* only, and became subject to regulation by the public.

I proceed now to examine this argument and point out the objections that have been made to it.

The first important matter for consideration is the Police Power of the State.

Vague and almost impossible of definition as are the Police Powers of a State, it may be taken as established that such a use of one's property as unnecessarily to injure others can always be prevented by State interference. "The Police Power of a State, in a comprehensive sense, embraces its whole system of internal regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of

good manners and good neighborhood which are calculated to prevent a conflict of rights, and to ensure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."¹

It is needless as it would be tedious to multiply quotations from the numerous cases in which Police Powers have been defined, or, rather, described, but it may be remarked in passing that many of them emphasize the distinction between these powers and that of eminent domain, which latter can only be exercised on condition of providing compensation therefor.

On the other hand, the Police Power extends, in cases to which it is applicable, to the absolute destruction of private property, without providing any compensation at all.

"The acknowledged Police Power of a State extends often to the destruction of property; a nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed."²

But a reference to some of the principal cases in which the Police Power has been exercised, and upheld by the Supreme Court, will show that there had been some element in each case which afforded at least an ostensible reason for the interference of the State, on the ground that the health, morals, or safety of the public were affected.

Thus, in the Slaughter House Cases,³ an exclusive privilege of slaughtering cattle within an area of more than one thousand miles was sustained. It can be imagined that regulations regarding the slaughtering of animals might be necessary for the public health. This decision was followed in the case of New Orleans Gas Company *v.* Louisiana Light Co.,⁴ which granted exclusive privileges for lighting a city, and this case was distinguished from *Stone v. Mississippi*⁵ and *Butchers' Union v. Crescent City Co.*,⁶ on the ground that the contract was not in any legal sense to the prejudice of the public health or safety.

In *Patterson v. Kentucky*,⁷ a State statute was held valid which imposed a penalty for selling patented oils of a dangerously inflammable nature.

¹ Cooley's Constitutional Limitations (6th Ed.) 704.

² McLean, J., in *The License Cases*, 5 How. 504.

³ 16 Wall. 36.

⁴ 115 U. S. 650.

⁵ 101 U. S. 814.

⁶ 111 U. S. 746.

⁷ 97 U. S. 501.

In *Fertilizing Co. v. Hyde Park*,⁸ the Court sustained an ordinance which destroyed the business of the Fertilizing Company, it having become a nuisance, and dangerous to the health of the inhabitants.

In *Barbier v. Connolly*⁹ and *Soon Hing v. Crowley*¹⁰ ordinances which regulated the hours of work in laundries were sustained.

The above cases are instances of the exercise of the Police Power which, though not unanimously conceded, seem capable of being brought within the scope of the power.

But some later cases appear to have materially extended the application of the Police Power.

Thus in *Powell v. Penn.*,¹¹ the Supreme Court upheld the validity of a statute of Pennsylvania prohibiting the sale of oleo-margarine, although there was no evidence of its injurious effect on the health of the people. Justice Harlan says in his opinion¹²: "And as it does not appear upon the face of the statute, or from any facts of which the Court must take judicial cognizance, that it infringes rights secured by fundamental law, the legislative determination is conclusive upon the Court."

This decision has met with much disapproval. Justice Field, in his dissenting opinion,¹³ says:

"Here the article was healthy and nutritious, in no respect injuriously affecting the health of anyone. It was manufactured pursuant to the laws of the State. I do not, therefore, think that the State could forbid its sale or use; clearly not without compensation to its owner. Regulations of its sale and restraints against its improper use undoubtedly could be made, as they may be made with respect to all kinds of property; but the prohibition of its use and sale is nothing less than confiscation. * * * I have no doubt of the power of the State to regulate its sale when such regulation does not amount to the destruction of the right of property in it. The right of property in an article involves the right to sell and dispose of such article, as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such

⁸ 97 U. S. 659.

⁹ 113 U. S. 31.

¹⁰ 113 U. S. 703.

¹¹ 127 U. S. 678.

¹² p. 685.

¹³ p. 699.

arbitrary legislation by any State the Fourteenth Amendment affords protection. But the prohibition of sale in any way or for any use is quite a different thing from a regulation of the sale or use, so as to protect the health and morals of the community. The fault which I find with the opinion of the Court on this head is that it ignores the distinction between regulation and prohibition."

The Court of Appeals of New York in *People v. Marx*¹⁴, was called upon to decide the constitutionality of a State statute of New York involving the same question as that in *Powell v. Pennsylvania*, and it came to the conclusion that the statute was unconstitutional. Judge Dillon, commenting on the conflicting decisions as above, says:¹⁵

"We cannot refrain from expressing our full concurrence in the views and conclusions of the Court of Appeals of New York in *People v. Marx*. It will not escape observation that the Court of Appeals of New York and the Supreme Court of Pennsylvania reached opposite conclusions on a question relating so vitally to the natural, inalienable, and primordial rights of the citizen. The judgment of the Supreme Court of Pennsylvania sustaining the Act of 1885, was affirmed by the Supreme Court of the United States, and on like grounds if the New York statute (which was in judgment in the case of *People v. Marx*) had been before the Supreme Court of the United States its validity would have been upheld, unless the Supreme Court had followed the judgment of the Court of Appeals. We have at all events that which is regarded as a fundamental right in New York considered not to be such in Pennsylvania. * * * * We cannot but express our regret that the Constitutions of the States or that of the United States, admits of a construction that it is competent for a State Legislature to suppress (instead of regulating) under fine and imprisonment the business of manufacturing and selling a harmless and even wholesome article, if the legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of the conviction of Powell for selling, without any deception, a healthful and nutritious article of food, makes one's blood tingle."

In the same year, 1887, the case of *Mugler v. Kansas*, came before the Supreme Court of the United States¹⁶. *Mugler* was

¹⁴ 99 N. Y. 377.

¹⁵ Dillon on Mun. Corps., p. 211, Note 1.

¹⁶ 123 U. S. 623.

the owner of a brewery in Knasas, and the Legislature of that State, enforcing a constitutional restriction upon the manufacture and sale of intoxicating liquors, passed a statute which practically destroyed Mugler's business, and rendered his property worthless. Under it he had been compelled to submit to the destruction of liquors already manufactured, and of bottles, glasses and other utensils of his trade.

The majority of the Court upheld the validity of the Kansas statute, even to its affecting property engaged in the business when a lawful one. Justice Harlan says on this point:¹⁷

"This is not depriving the citizen of his property without due process of law, and that interpretation of the 14th Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their power for the protection of the safety, health, or morals of the community." And further:¹⁸ "The principle that no person shall be deprived of life, liberty or property without due process of law * * * has never been regarded as incompatible with the principle equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." And again:¹⁹ "The exercise of the Police Power by the destruction of property which is itself a public nuisance; or the prohibition of its use in a particular way whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case a nuisance only is abated, in the other unoffending property is taken away from an innocent owner."

This decision was affirmed and followed on a similar state of facts in *Kidd v. Pierson*.²⁰

Commenting upon statutes of this kind, Judge Cooley says:²¹

"Perhaps there is no instance in which the power of the Legislature to make such regulations as may destroy the value of property, without compensation to the owner appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the Legislature then steps in and by

¹⁷ 123 U. S. 664.

¹⁸ p. 665.

¹⁹ p. 669.

²⁰ 128 U. S. 1.

²¹ Cooley's Const. Limit. 719.

an enactment based on general reasons of public utility annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand. Even the keeping of that, for the purposes of sale, becomes a criminal offense; and, without any change whatever in his own conduct or employment, the merchant of yesterday becomes the criminal of today, and the very building in which he lives and conducts the business which to that moment was lawful becomes the subject of legal proceedings, if the statute shall so declare, and liable to be proceeded against for a forfeiture. A statute which can do this must be justified upon the highest reasons of public benefit; but, whether satisfactory or not, the reasons address themselves exclusively to the legislative wisdom."

It is submitted that the cases last cited differ in principle from the earlier decisions in that the injury to the public, by which the exercise of the Police Power is justified, is one more of opinion than fact, and in this distinction lies the root of the dissent to them. All opinions would agree in principle that the indiscriminate slaughter of animals might be gravely prejudicial to the health, or the unrestricted sale of peculiarly inflammable oils dangerous to the safety of the community, as might be also the injudicious exercise of a calling which might threaten fire. In such cases the majority without special knowledge of the facts would be likely to accept as correct, and to abide by the decision of those whose duty it was to watch over the public health and safety.

But when these plain principles, founded on states of fact which command universal assent, are passed, and the heated and hazy realm of opinion is entered upon, the conditions are changed. Instead of the exercise by the State of a salutary protective power, whose sphere and limits are understood and acquiesced in by all, there is substituted the spasmodic activity of a fluctuating public opinion. If the final word as to what is or what is not within the scope of the Police Power be left to a legislative majority, all security to the citizen is gone; all he has, all he does, would be subject to the veto or the regulation of the omnipotent half plus one.

A careful consideration of the disapproval shown towards the decisions of *Powell v. Pennsylvania* and *Mugler v. Kansas* will, I think, indicate that great as are the objections to them on the ground of their interference with property rights, the fundamental objection is the menace to the liberty of the citizen which they contain.

In his address to the graduating class of the Yale Law School last year, the Hon. W. E. Russell dwelt upon the tendency to incorporate more and more minute details into State constitutions, in order to place such matters beyond the changing ideas of legislative majorities. He says:²²

"An illustration of the evil to which I refer may be found in the experience of some of our States with constitutional prohibition. However wise and necessary prohibition may be, the proper place for this much-controverted restriction is in statute, not constitutional, law. Dependent for its enforcement upon statute law and a sustaining public sentiment, it gains little by constitutional recognition, while the constitution itself may suffer by the evasions and opposition of a discontented people unable lawfully to assert their will. Referring to this danger a distinguished jurist has forcibly said a constitution is not a code, civil or penal; and whatever tends to turn it into one endangers its ultimate stability by exposing it to every gust of popular excitement or caprice. * * * To put into a constitution a rule which a statute would sufficiently prescribe, and which must be supplemented by a statute to make it effective would be simply to take advantage of the greater permanency of the organic law in the interest of a majority, for a purpose quite foreign to the purpose of that instrument, and might well argue a distrust on the part of that majority of their ability to maintain their ground in the convictions of the people. If this be its significance * * * it would exemplify that tyranny of the majority which the friends as well as the foes of democratic institutions concede to be their greatest inherent danger."

And again:²³ "This modern constitutional growth with its excessive government and its many restrictions firmly fastened on the people seems also to conflict with the principle of freedom from restraint which is the very essence of democracy, finding expression in such terms as free institutions, civil liberty and self government. With its more of control and less of compact it marks an evolution backward in the progress of civilization. The time was, says Spencer, when the history of a people was but the history of its government. It is otherwise now. The once universal despotism was but a manifestation of the extreme necessity of restraint. Feudalism, serfdom, slavery, all tyrannical institutions, are merely the most vigorous kinds of rule, springing out of, and necessary to, a bad state of man. The

²² Address of Hon. W. E. Russell to Yale Law School, June, 1894, p. 30.

²³ p. 28.

progress from these is in all cases the same, less government. Constitutional forms mean this. Political freedom means this. Democracy means this."

But if the constitutions themselves afford no practical protection against the insidious invasion of this subtle power, the citizen feels that he has no longer any firm ground under him. All the conditions of his daily life must be shadowed by a feeling of insecurity which will deaden his energies, and destroy his happiness and usefulness.

This discussion of the Police Power is, perhaps, not strictly within the scope of the subject of this essay, but it has been entered upon with the object of attempting to show that the principles of the application of the Police Power have undergone considerable change. Constitutional provisions seem to be not only flexible but squeezable.

But coming now to the immediate question, we find that the application of the Police Power is even more elastic than the above discussion has shown it to be. In the case of *Munn v. Illinois*, no question of the health, morals, or safety of the community was in issue. The State of Illinois determined that it would be for the benefit of the State that grain elevators should be under public control, and the thing was done. And the Supreme Court of the United States upheld this action as a legitimate exercise of the Police Power, on the ground that the grain elevators were property affected with a public interest. The wide-spread dissent from this decision seems to emphasize the position taken above, that the more the Police Power is invoked to carry out matters of opinion the more danger is there in its application. For of all the various "squeezes" which the constitutional provision has received, this one seems to have been the hardest. The only matter of fact that existed in the case was that the business was a monopoly, and that was qualified by its being only of a "virtual" kind.

In the face of these conditions, the Court took a legal "leap in the dark," and by a construction of the applicability of the Fourteenth Amendment to restrain State Police Power gave that clause a shock which in the minds of many eminent jurists deprived it of any practical force for the future. For the question is one of construction primarily.

"It should be observed, however, that this question is simply one of construction, the object being to ascertain the true meaning of the constitutional amendment. No argument can be of service in solving this question, except by throwing light upon

the purposes for which the Amendment was passed. The prohibition is absolute in terms, and, as was pointed out by Justice Field, the right to enjoy life and liberty is guarded by no more stringent provisions than the right to enjoy property. It is reasonable to imply that the Amendment was not designed to impair the power of the States to enact such laws as were by common consent, at the time of the adoption of the Amendment, deemed within the proper and ordinary sphere of legislative action, even though private rights should thereby be interfered with, but it would not be reasonable to carry this implication further. The States have always the power to take private property when the public interest demands this, by exercise of the power of eminent domain, upon providing just compensation."²⁴

That my statement as to the effect on the Fourteenth Amendment is justified the following will show: "This doctrine that whenever one's property is used in such a manner as to affect the community at large it becomes clothed with a public interest and ceases to be *juris privati* only, destroys the efficacy of the constitutional guarantee."²⁵

The next point in the argument is that because in England and in this country it has always been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and that this has never been regarded as coming within the constitutional provision against interference with private property, therefore it is apparent that down to the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use of private property necessarily deprived an owner without due process of law.

In view of the objections that have been made to this proposition, some of which are given below, it may not be thought presumptuous to express the opinion that a more remarkable *non sequitur* seldom appears in a judicial opinion:

"Formerly it was common by legislation to regulate wages, and the prices of merchandise, or whatever any one person might have to dispose of to another. To some extent this was done in this country in colonial days, but never generally; and the old laws on the subject were unquestionably innovations on common right, and usurpations of authority. In some cases, however, the right to regulate charges is still exercised, and in the following cases may be justified on principle:

²⁴ Morawetz on Private Corporations (speaking of *Munn v. Ill.*) Vol. 2, pp. 1033-1034.

²⁵ Field J. in *Munn v. Ill.*

"1. Where the business is one the following of which is not a matter of right, but is permitted by the State as a privilege or franchise (lotteries, ferries, tolls).

"2. When the State on public grounds renders to the business special assistance by taxation, or under the eminent domain (railroads).

"3. When, for the accommodation of the business, special privileges are given in the public streets, or exceptional use of public property or easement (hackmen).

"4. When exclusive privileges are granted in consideration of some special return to the public, or in order to secure something to the public not otherwise obtainable (Slaughter House Cases, 16 Wall. 36)."

The author continues significantly: "To these may be added:

"5. Those employments which are *quasi* public and essential to the business of the country, but of which the circumstances give to a few persons a virtual monopoly at each important commercial center; such as those who own elevators for the storage of grain have in the city of Chicago."²⁶

It is to be observed that the fifth class is not included by the author among those which may be justified on principle.

"Hale's doctrine of property as affected by a public interest referred only to property dedicated by the owner to public use, or to property the use of which was granted by the government, or in connection with which special privileges were conferred."²⁷

This is the view of Hale's doctrine taken by the learned author of Cooley's Constitutional Limitations, as follows: "The phrase 'affected with a public interest' has been brought into recent discussions from the treatise *De Portibus Maris* of Lord Hale, where the important passage is as follows:" quoting the whole passage which ends thus:

"'For now the wharf, crane, and other conveniences are affected with public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest but is affected by a public interest.'"

The author comments on this also:

"If the case of a street thrown open to the public is an apt illustration of the public interest Lord Hale had in mind, the interest is very manifest. It will be equally manifest in the case of the wharf, if it is borne in mind that the title to the soil under

²⁶ Cooley's Const. Law, 245-246.

²⁷ Field J. in *Munn v. Ill.*

navigable water in England is in the Crown, and that wharves can only be erected by express or implied license, and can only be made available by making use of this public property in the soil. If then, by public permission, one is making use of the public property, and he chances to be the only one with whom the public can deal in respect to the use of that property, it seems entirely reasonable to say that his business is affected with a public interest which requires him to deal with the public on reasonable terms."²⁸

It is difficult to conceive how the facts in *Munn v. Illinois* can be brought within those classes which Cooley says may be justified on principle.

The English case of *Allnutt v. Inglis*²⁹ was also relied upon as supporting the right of regulation on account of the "virtual monopoly."

But what says Lord Ellenborough in his opinion in that case?

"Here, then, the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. *If the Crown should hereafter think it advisable to extend the privileges more generally to other persons and places*, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly: but at present, while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction, and it is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches as laid down by Lord Hale in the passage referred to, which includes the good sense as well as the law of the subject."³⁰

The words I have italicized clearly show that this monopoly was one created by the sovereign authority, and removed only by its action.

It seems, therefore, that the English authorities quoted in support of the decision show only that private property is affected with a public interest when public land is used by a private person under a license express or implied, or when the owner of private land himself dedicates it to a public use, or when a monopoly conferring peculiar advantages is granted by the State.

²⁸ Cooley's Const. Limit. 737-738.

²⁹ 12 East 527.

³⁰ pp. 540-541.

The principle that the public interest attaches when the monopoly is a legal one seems to be further supported by the words of Chief Justice Holt, as follows:³¹

"Now there are two sorts of acts for doing damage to a man's employment for which an action lies, the one in respect of a man's privilege, the other in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action, though by grant from the king. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned."

It may be admitted that in *Munn's* case there was a virtual monopoly, but, as is pointed out by Justice Brewer,³² "There are two kinds of monopoly, one of law, the other of fact. The one exists when exclusive privileges are granted; such a monopoly the law which creates alone can break, and being the creation of law, justifies legal control. A monopoly of fact anyone can break, and there is no necessity for legislative interference."

This surely is the kind of monopoly that *Munn* had.

The attempt to bring the case within the classes of the occupations named in the opinion as subject to legislative regulation (common carriers, hackmen, etc.) seems hardly to be more successful. For my quotation from *Cooley's Constitutional Law* shows that all these occupations receive a privilege or benefit from the State.

In the case of *People v. Budd*,³³ a similar state of facts was in issue, and the New York Court of Appeals followed the decision of the Supreme Court in *Munn v. Illinois*, and upheld the validity of the statute. In his dissenting opinion in this case, Peckham, J., forcibly sets forth his view of what constitutes a dedication to public use. He says:

"I contend that within the subject now under review, the meaning of the phrase 'devoting one's property to a public use,' as evidenced in the cases cited by the learned Chief Justice (of New York), and also in other cases in this State, is that such devotion or dedication is made when, by reason of it, the public thereafter have a legal right to resort to the property and to use it for a reasonable compensation, or for such as the law provides, or else where some privilege or right is granted by the govern-

³¹ *Keeble v. Hickeringill*, 11 East 575.

³² *Budd v. N. Y.*, 143 U. S. 517.

³³ 117 N. Y. 1.

ment, in which case the right of limitation is based upon, and is really a part consideration for the grant."³⁴ And further: "The facts of the case must be taken into account whenever expressions are used of a somewhat general nature, and it is evident that when the English judges and courts spoke of an owner of property devoting it to a public use, or one in which the public had an interest, they meant that by reason of such devotion, the public thereafter had a right to resort to the place where the property was, and a legal right to demand its use on payment of a reasonable compensation."³⁵ And again: "Whenever it has been claimed heretofore that property has been devoted to a public use, the term has expressed the fact which existed; that the public had a right of resort to the premises and to use the property, or to demand transportation, etc., upon reasonable compensation being paid or tendered."³⁶

Enough has been said to show that in the opinion of those who dissent from the views of the majority of the Supreme Court on this point, the authorities cited by the decision do not support its conclusions, and furthermore, that the circumstances which do in reality affect private property with a public interest are clearly defined.

To repeat Judge Peckham's expressions, "the term has expressed the fact which existed, the public had a right to use the property upon reasonable compensation."

But the Supreme Court says: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use."

No reflection is necessary to perceive the unlimited scope of these words. No intention on the part of the owner to dedicate, no waiver of public right in his favor on the part of the public is required to establish this interference with his business and its profits. All that is requisite is that he shall devote his property to a use in which the public has an interest. The far-reaching effect of this doctrine has been shown by the great lawyers who have criticised it and dissented from it, as the following quotations will illustrate.

Justice Field says in his dissenting opinion:

"The majority opinion holds that as the public are interested

³⁴ 117 N. Y. 41.

³⁵ p. 52.

³⁶ p. 59.

in the storage of grain, the defendant, by devoting the building to that storage has granted to the public an interest in that use, and must submit to have his compensation regulated by the Legislature. If this be sound law, all property and all business are held at the mercy of a majority of the Legislature."

Justice Brewer says:³⁷

"There is scarcely any property in whose use the public has no interest. No man liveth unto himself alone, and no man's property is beyond the touch of another's welfare. Everything, the manner and extent of whose use affects the well-being of others, is property in whose use the public has an interest." And further on: "If it (the government) may regulate the price of one service which is not a public service, or the compensation for the use of one kind of property which is not devoted to a public use, why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property?"

In an address by the Hon. George Hoadly, of New York,³⁸ the cases in which the right of the citizen to protection of life, liberty and property has been in question are reviewed, and certain conclusions are drawn, the fourth and fifth of which are as follows:

"4th. That all property and avocations in which the public have an interest are so devoted to the service of this public that they may be controlled by the Legislative power without the necessity of resort to the power of eminent domain, or compensation.

"5th. That as the extent of the Police Power is indefinite, so also are the facts and circumstances which shall constitute such practical dedication of property or services to others, indefinite. At present they are expressed under an *et cetera*, and it is reserved for the future judiciary to explain this symbol and give its full and accurate meaning."

And Judge Cooley³⁹ says:

"What circumstances shall affect property with a public interest is not very clear. The mere fact that the public have an interest in the existence of the business, and are accommodated by it cannot be sufficient, for that would subject the stock of the merchant and his charges to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the

³⁷ *Budd v. N. Y.*, 143 U. S. 517.

³⁸ *Journal of Social Science*, No. 26.

³⁹ *Cooley's Const. Limit.* 737.

public, but his offer does not place him at the mercy of the public in respect to charges and prices."

To sum up the foregoing examination.

The decision in *Munn v. Illinois*, founded upon old common law authorities which, as was said by Justice Field, are in conflict with it, sanctions an application of the Police Power of the State so extended that the constitutional guarantee is nullified, and all power of resistance to the taking of property is logically destroyed. It only remains for me, in leaving this part of the subject, to note that in this decision two Justices dissented.

In *Budd v. New York*⁴⁰ a similar case, decided in 1891, the minority was increased to three; and in *Brass v. Stoeser*,⁴¹ decided in 1893, on substantially the same state of facts, the minority again added one to its strength, four Justices dissenting.

It should also be noted that in this last case the Dakota statute, in addition to requiring the storage of grain for everybody who demanded it at a fixed price, imposed upon the owner of the warehouse the additional burden of advancing money to insure the property thus forced upon him. Justice Brewer in his dissenting opinion says that if the Legislature can do this, "I can only say that it seems to me that the country is rapidly traveling the road which leads to that point where all freedom of contract and conduct will be lost."⁴² It would seem from this last case that the quality of being affected with a public interest attaches to the cash of the owner of a grain warehouse as well as to the warehouse itself.

One more matter connected with the past history of this subject.

In 1889 the Supreme Court, in the case of *Chicago, etc., R. R. v. Minnesota*,⁴³ decided that when the Legislature establishes a railroad commission, and the Act is interpreted by the Supreme Court of the State as providing that the rates of charges recommended and published by the commission should be conclusive on the railroad companies, and that, therefore, there can be no judicial inquiry as to the reasonableness of these rates, the Act is in conflict with the Constitution of the United States, as it deprived the company of its property without due process of law, and of the equal protection of the laws. From this decision three Justices dissented.

Justice Bradley, in his dissenting opinion, says:

⁴⁰ 143 U. S. 517.

⁴¹ 153 U. S. 391.

⁴² 152 U. S. 410.

⁴³ 134 U. S. 418.

"This decision practically overrules *Munn v. Illinois*, the governing principle of which was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative and not a judicial prerogative. I differ from the majority of the Court in thinking that the final tribunal is the Legislature, they the judiciary."

Thus far I have dealt with the matter involved in this decision from the point of view of the arguments adduced in its support in the decision itself, examining these arguments in the light of legal precedence, and testing them by the criticism of legal authorities. And the foregoing pages will, I think, have shown that, viewed as a legal question only, the unlimited scope of the doctrine cannot be supported. Can any other reasons be found for sustaining the decision? In what follows I shall try and show that there can.

A very careful study of the opinion as it was delivered by Chief Justice Waite leaves the student in wonder that the conclusions arrived at from the authorities used as support could ever have commended themselves to the Court. So untenable do they appear that one is forced to seek some underlying ground of right or expediency as the real foundation for the decision, the arguments being made to support the conclusion, rather than the conclusion being deduced from the argument. With this in mind, the following passage in the opinion seems of great significance:

"It is of no moment that no precedent can be found for a statute precisely like this. The business was one of recent origin, rapid growth, and one in which the whole public has a direct and positive interest. *This statute simply extends the law to meet this new development of commercial progress.* There is no attempt to compel these owners to grant the public an interest in the property, but to declare their obligations if they use it in this particular manner."

The words I have emphasized seem to contain the germ of the principle upon which the decision was made. Later on the Chief Justice says:

"Rights of property created by common law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitation. The great office of statutes is to remedy defects in the common law as they are developed." It is true that he also says: "To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only

changing a regulation which existed before. It establishes no new principles in the law, but only gives effect to an old one."

This latter statement, however, takes nothing from the former ones, for the question in this case was whether the public *had* such an interest in the business as to justify the regulation of the charges made in it, not, whether, granting the interest, the regulation could be made. It would appear, then, that the real principle of the judgment is that the statute simply extends the law to meet this new development of commercial progress.

What does this mean? It means that the progress of events had given to a few individuals, exercising a lawful private trade, a virtual control over the grain business passing through Chicago, and that the Legislature had therefore placed this private business under public regulation by this statute. It was in effect a statute against monopolies. Hence we have the principle, Monopoly justifies Control.

It can hardly be denied that the old common law exercised such control, whether the monopoly was one of law or one of fact, and the way it viewed attempts to enhance the price of the necessities of life is forcibly set forth in the case of *Rex v. Waddington*⁴⁴ decided in 1801.

The defendant was indicted for what would, in our day, be termed trying to "corner" hops.

Lord Kenyon says:

"But this is to me most evident, that in whatever manner the supply is made, if a number of rich persons are to buy up the whole or any considerable part of the produce from whence such supply is derived, in order to make their own private and exorbitant advantage of it to the public detriment, it will be found to be an evil of the greatest magnitude, and I am warranted in saying that it is a most heinous offense against religion and morality, and against the established law of the country. That our law books do declare practices of the sort with which the defendant is charged to be offenses at common law cannot be denied."⁴⁵

Lord Kenyon then meets the objection that the statutes 5 and 6, Ed. vi., C. 14, against regrators, forestallers and engrossers, having declared what the common law was, and it having been determined that hops were not a victual within the Act, therefore the engrossing of hops was never an offense at common law, not being a necessary of life, by showing that times had changed, and that hops had now become necessities. He continues by

⁴⁴ 1 East 141.

⁴⁵ p. 154.

saying that if the defendant went into the market "for the purpose of making his purchases in the fair course of dealing, with a view of afterwards dispersing the commodity which he collected in proportion to the wants and conveniences of the public, whatever profit accrues to him from the transaction no blame is imputable to him. On the contrary, if the whole of his conduct shows plainly that he did not make his purchases in the market with this view, but that his traffic there was carried on with a view to enhance the price of the commodity, to deprive the people of their ordinary subsistence, or else to compel them to purchase it at an exorbitant price, who can deny that this is an offense of the greatest magnitude? It was the peculiar policy of this system of laws to provide for the wants of the poor laboring classes of the country."⁴⁶

"It is our duty to take care that persons in pursuing their own particular interests do not transgress these laws which were made for the benefit of the whole community. I am perfectly satisfied that the common law remains in force with respect to offenses of this nature. * * * There I find nothing which trenches on what I have said, but only a repeal of certain statutes, upon none of which is this prosecution founded, but upon the common law."⁴⁷

And Grose, J., says in the same case:

"When, however, we recollect the anxiety shown by our ancestors to prevent the commission of this class of offenses, and when we recollect what the common law as handed down to us by our ablest reporters and commentators upon this subject is, we cannot but deem that it would be a precedent of most awful moment for this Court to declare that hops, which are an article of merchandise and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article, the price of which it is a crime by undue means to enhance; or that the statute 12 Geo. III., C. 71, which expressly repeals certain specified statutes, was intended to repeal other statutes not specified, and to repeal that which the common law of the land has ordained for the protection of the poor, in preventing the advancing of the price of those commodities without which they cannot exist."⁴⁸

"In mitigation of punishment the Court has been repeatedly and strongly addressed upon the freedom of trade, as if it were

⁴⁶ 1 East 157-158.

⁴⁷ pp. 158-159.

⁴⁸ pp. 162-163.

requisite to support the freedom of trade that one man shall be permitted, for his own private emolument, to enhance the price of commodities become necessities of life, and thereby possibly prevent a large portion of his majesty's subjects from purchasing those necessities at all. The freedom of trade, like the liberty of the press, is one thing, the abuse of that freedom, like the licentiousness of the press, is another. God forbid that this Court should do anything that should interfere with the legal freedom of trade. * * * But the same law that protects the proprietors of merchandise takes an interest also in the concerns of the public; by protecting the poor man against the avarice of the rich; and from all times it has been an offense against the public to commit practices to enhance the price of merchandise coming to market, particularly the necessities of life, for the purpose of enriching an individual. * * * For the sake of the public, and especially of the poorer part of his majesty's subjects, the law pays particular respect to the necessities of life, the price of which a man is not permitted to enhance by undue means for his own private profit. In these and other respects the freedom of trade has its limits, and is, and must be, like our other liberties, regulated by law."⁴⁹

I have quoted this opinion at somelength, as it seems to show that the common law at all times would interfere to prevent anything done by a private individual that might unduly enhance, to his profit, the necessities of life.

The Court in *Munn v. Illinois*, appear to have applied the reasoning of the common law courts applicable to cases of virtual monopolies of *law* to a case where the virtual monopoly was one of *fact*. If this latter case of monopoly was controllable at all at common law, it was under the principles laid down in *Rex v. Waddington*, quoted above.

In *Munn's* case the article affected was grain, the first of all necessities of life; the charges made by the warehouseman were thought by the Legislature of Illinois to be excessive and unfair. Have we not here all the elements necessary to bring the case within the controlling power of the old common law as laid down above? It would seem that if the Court, finding this to be a case for which, as was said, there was no precedent, had, in recurring to the old principles of the common law, supported the statute on the broad grounds stated in *Rex v. Waddington*, the analogy would have been much closer than it was to the dictum of Lord Hale.

⁴⁹ 1 East 163-164.

If, then, this statute can be brought under the common law forbidding the doing of anything which enhances unduly the necessities of life, in what direction does this lead us? It would be an expression of the approval by the Supreme Court of restrictions put upon monopolies of anything necessary to the public. Such an approval would undoubtedly commend itself to the minds of the majority of the people of the United States.

The rapid development of Trusts and Combinations has angered and alarmed the masses, who have constantly before them the fear of being robbed by the capitalists.

The Hon. W. E. Russell, in the address from which I have already quoted, says:

"You remember the thought expressed by Sir Henry Maine that society, in its opinions and necessities, is always in advance of law; that the progress of the one and the stability of the other make a gulf between them, often closing, often opening; but that the greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed."⁵⁰

It may be, then, that the Supreme Court, recognizing the great and growing hostility of the people to monopolies in any form, and finding that the law as it stood did not meet the popular desires, accepted this statute as an extension of the law to meet "a new development of commercial progress," founding its decision upon the common law, though upon unfortunate examples of it, and, thereby, in Sir H. Maine's words, closing the gulf existing between the law and the opinions and necessities of society.

Although, then, in a sense, this may be an extension of the law to meet a development of commercial progress, it does not follow that it is an extension forward. It would rather seem to be an extension backward. For the principle that really received the sanction of the Supreme Court was the right of the government to interfere with all private property, with its use and enjoyment, whenever it considers it necessary for the public good to do so. My reference to Cooley's Constitutional Law has shown that in old times it was customary to regulate almost every transaction of men by governmental rules.

"Such legislation," says Earl, J.,⁵¹ "may invade one class of rights to-day and another to-morrow, and if it can be sanctioned under the Constitution, while far removed in actual time we will not be far away in practical statesmanship from those ages when

⁵⁰ Address to Yale Law School, p. 9.

⁵¹ In the matter of Jacobs, 98 N. Y. 114-115.

governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since, in all civilized lands, regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

This expresses in clear terms the ideas which have heretofore been the prevailing ones in free countries, and which were supposed to be especially dear to all democracies.

To repeat Spencer's words, "Feudalism, serfdom, slavery, all tyrannical institutions, are merely the most vigorous kinds of rule, springing out of, and necessary to, a bad state of man. The progress from these is in all cases the same, less government. Constitutional forms mean this. Political freedom means this. Democracy means this."

But does it? It was undoubtedly the idea of the older professors of democracy that it meant less government, the smallest possible interference with the individual. I think, however, that time has shown that this is not true. The tendency of every country that is in name or effect democratic is towards more government, more interference with the individual. The practical working of the decision of the State of Kansas to prohibit entirely the manufacture and sale of intoxicating liquors furnishes an example of an interference with personal liberty, and a disregard of what have hitherto been considered as private rights which the most despotic government would have hesitated to perpetrate. In old days the people seem to have required protection against their rulers, now they seem to require protection against themselves. Whether this is the outcome of the conviction, more and more widely extended, that every action of man, however personal it appears to be, in reality affects his fellow citizens, or whether it is that majorities are as strongly disposed as monarchs to be tyrannical and impose their will on their fellow countrymen, I do not venture to say. But the fact is too plain to be disputed, that the freer a people is politically, the more government it has. It is almost pathetic to observe the growing belief of the masses of the people that legislation can cure all the ills of life.

When, therefore, the growing power of combinations and monopolies began to attract attention, the demand was for legislation to suppress them. And here the gulf between law and

social opinion at once opened. It is impossible to suppose that the framers of the Fourteenth Amendment had in view any such omnipotent exercise of the Police Power by the State as would practically nullify the protection it afforded, and therefore any decisions that have that effect have not been received with approval by lawyers.

But what if the enforcement of the Fourteenth Amendment should stand in the way of remedying matters that have become, in the minds of the people at large, crying abuses? Here, then, seems to lie the difficulty that the Supreme Court had to meet. The people of Illinois believed that monopolies of this kind were injurious to them; they believed that by controlling them by law they could rid themselves of the evil, and they enacted such laws. What would have been the effect if such laws, enacted, as the people believed, to afford them protection against great injury, had been declared unconstitutional by the highest authority in the land? Would not the law have been so far discredited that every means would have been tried to evade and pass it by? But recently the question of legalizing the Sunday opening of saloons has been agitated in New York, and the facts brought to light seem to show quite clearly that a law that does not command the assent of the people has very little effective strength.

Viewed from the standpoint of the political economist, can it be affirmed that the Fourteenth Amendment must be so rigidly interpreted as to make the welfare of the citizen subordinate to the rights of private property? It has been said that the effect of the doctrine of *Munn v. Illinois* is to put all private property at the mercy of a legislative majority. What would be the effect of the opposite view if pushed to its logical conclusion?

It would be that the general welfare of the citizens, the price of their food, of their clothing, of all the necessities of life might be put at the mercy of a few men who, in the lawful exercise of the means open to them in their private business, might obtain such control over the sources of supply as to fix the price of all commodities at their will.

It is no answer to this to say that excessive prices are prohibitive, and consequently that a monopoly would be of no practical value if carried too far. Before that point was reached there would be a great deal of inconvenience, perhaps suffering, throughout the country, and incentives to violence and crime would be very largely increased.

Justice Brewer says:⁵²

⁵² *Budd v. N. Y.*, 143 U. S. 517.

"That property which a man has honestly acquired he retains full control of, subject to these limitations: first, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit."

This is very true, but in the state of facts just supposed, can it be said that such a use of one's property does not injure his neighbor? And if it does, where would the power lie to prevent this injury if not in the inherent power of self-preservation of society, which, if it is to be exercised peaceably, must act through legislative channels?

In truth, viewed in this light, and setting aside the inapplicable technicalities with which the decision was supported, it seems that the Court intended to lay down the principle known to the common law, and in earlier times frequently put into force, that there is a point beyond which the use of private property is not lawful; and that that point is reached when, though by means in themselves perfectly legitimate, the well-being of the community is menaced by its use. And that when this occurs, the use is one in which the public have an interest, and in the preservation of that interest are entitled to regulate the use so as to minimize the injury. It may be called Police Powers, it may be called self-preservation, but *Salus populi suprema est lex*.

Before turning to the tendencies of this doctrine, it will perhaps be well to sum up very briefly the conclusions I have drawn. They are these:

1. That, taking the decision as it appears from the arguments brought forward to support it, and from the authorities cited, it fails to establish its conclusions, because the argument is an attempt to apply the common law principles appropriate to legal monopolies to a monopoly of fact, a very different thing.

2. That the real foundation of the decision is the desire of the Court to recognize a popular demand, and by so doing to bring the law into harmony with the wants and wishes of the people, in the face of a new development of commercial progress.

3. That if the subject of the decision was one which menaced the security and well-being of the community, the inherent right of self-preservation is to that extent paramount to the right of the use of private property by the individual, and is entitled to enforcement by the common law, no constitutional provision limiting, or having been intended to limit, this fundamental and inalienable right.

The scope of this essay makes it now necessary to pursue the inquiry as to the tendencies of the doctrine of property affected

with a public interest, and in doing so I leave behind me the comparatively sure ground of legal principles and precedents, and enter upon the slippery path of prophecy and conjecture.

The first thing of course that occurs to the inquirer is that this doctrine strikes a telling blow at individualism, and lends a strong support to the socialistic ideas of the day. To quote again from Justice Brewer:

"The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property is both the limitation and duty of government. If it may regulate the price of one service which is not a public service * * * why may it not with equal reason regulate the price of all service, and the compensation to be paid for the use of all property? And if so 'Looking Backward' is nearer than a dream."⁵³

And this, no doubt, in the minds of those whose opinions are formed on the theories prevalent during the greater part of this century, is a very pestilent innovation. In a work just published by Mr. Ernst von Halle, called "Trusts or Industrial Combinations and Coalitions," which is a translation and amplification of a report made by the author to the *Verein für Social-Politik*, a most instructive and able examination is made of the development and conduct of the great combinations in the United States. On the main portion of his work I do not, of course, propose to touch, as it would be beyond my purpose, and, moreover, it should be read in its entirety. But I mention it here because, in his first chapter, the author traces the course of public opinion in the United States in regard to monopolies. "The Constitution," he says on page 2, "aimed at securing equal personal rights for every one, and at prohibiting whatever might be attempted to cripple them, or to interfere with the free transaction of lawful private business. It was drawn up in the time of the complete predominance of the 'physiocratic' doctrine of natural rights, and the rise of the *laissez faire* theory." And after showing that these ideas permeated all public life for the first half of this century, and that they seemed for a time justified by the want of success attending State ownership, as in banks and railroads, and of the opposite result achieved by individuals, he continues: "And a disinclination for the interference of society with the sphere of the individual was more widely diffused than in any other country. To forbid as little as possible, and to regard what was not forbidden as silently permitted, to consider a right once granted as

⁵³ *Budd v. N. Y.*, 143 U. S. 517.

irrevocable, these were the principles on which public opinion was built. The device of free competition partook, in the eyes of the people, of the character of an eternal, holy truth, remote from the influences of time and economic conditions. Whoever disregarded it was *eo ipso* wrong; his actions were against public policy."

One or two references to authorities will show that this is correct. "Instead of saying that all private property is held at the mercy and judgment of the public, it is a higher truth that all rights of the State in the property of the individual are at the expense of the public."⁵⁴

"The less the State interferes with industry, the less it directs and selects the channels of enterprise, the better. There is no safer rule than to leave to individuals the management of their own affairs. Every individual knows best where to direct his labor, every capitalist where to invest his capital. If it were not so, as a general rule, guardians should be appointed, and who would guard the guardians?"⁵⁵

These, as Mr. von Halle shows, were the dominant ideas in England in the eighteenth century. But in that country their force gradually diminished until, in 1844, Parliament abolished all restrictive legislation in this direction. But in this country the courts did not adopt the English precedents. "They upheld the validity of the unchanged common law and statutory restrictions, occasionally even of some repealed in England before the time of the separation."

During the prevalence of these principles, the doctrine of individualism was combined with that of *laissez faire*. But when the changed economic conditions brought combinations into existence, the advocates of individualism, in calling for State interference, were compelled to abandon that part of their old doctrine. As Mr. von Halle puts it in his introduction: "Advocates of this principle (*laissez faire*) certainly fall into their own trap when they cry out for restrictions against things that have naturally developed, and for State interference to secure the unhindered working of natural forces."

In view of these facts is it so certain that the principles of the doctrine of *Munn v. Illinois* are socialistic? May it not be that the upholders of individualism against socialism, alarmed at the tendency of combination to destroy the individualism of industry, have abandoned their old doctrine of *laissez faire*, and invoked the aid

⁵⁴ Address to Yale Law School, 55 New Englander 97.

⁵⁵ 58 Maine 598.

of the State to crush these forces which threaten the existence of their cherished belief?

At first sight it would certainly appear, as I have before suggested, that the exercise of the power of the State to control the profit made in a private business is, in its essence, socialistic. But against what is the exercise of the power specially directed?

Against a monopoly.

The principle involved in monopoly, whether by a single individual or an association of individuals, is the destruction of competition. Competition is the ideal of the individualist, the *bête noir* of the socialist. To the former it is the only principle by which the greatest good of the people is to be attained. Low prices, high incentive, unlimited opportunities to every one by industry, energy, and skill to carve out for himself a successful career in what is always called the struggle for existence; all these are obtainable only through competition.

Holding this faith, can the individualist view with anything but alarm the growth, in any direction, of a principle so antagonistic to his scheme of life? He cannot meet the danger and destroy it by individual effort, for easy though it may be to argue that any one can break a monopoly, it can be broken only by a force equal or superior to it in power. And that implies the abandonment of principle in the formation of counter-combinations strong enough to fight the monopolist on his own ground. Feeling, then, his impotence, the individualist turns to the State, and invokes its assistance as against an enemy that is sapping the foundations of the national existence.

The principle, as I understand it, running through the whole of the common law in its antagonism to monopolies, was that they interfered with the free fight for existence which goes by the name of competition in political economy.

I would submit, therefore, that the doctrine of *Munn v. Illinois* may be regarded rather as an effort of individualism to stem the rising tide of combination, than as socialistic; a stand made by the individual rather than a move forward of socialism.

It can hardly be denied that the principle of combination is growing every day in all the most progressive countries of the civilized world. Whatever may be its ultimate fate, individualism is at the present time losing its hold on the faith of mankind. Possibly the intensity of the struggle of life in our time makes the individual more keenly conscious of his weakness. Judge Baldwin says: "John Stuart Mill has said that the great characteristic of modern civilization, of the new world which mankind

is forming for itself, not in territory but in mind and action, is that the importance of the masses is constantly growing greater and that of individuals less. It may be a tendency to be resisted, but it is certainly one that we must recognize, and recognize as a constant force."⁵⁶ All around us we see the signs of the tendency to combine. Perhaps the greatest instance of combination in modern times is that of the working classes in Trades Unions. It almost raises a smile to recall the furious denunciations and direful prophecies which this movement called forth in its beginning. But the times were with them, and they have lived to become a mighty force in the industrial world, and a force which, on the whole, makes for the peace and good order of society. It is significant that the incorporation of Trades Unions has lately been advocated by one of the coolest and least visionary of English political leaders. And so, true it is that notwithstanding all opposition on the part of those who do not read the signs of the times, the principle of monopoly or combination gains ground steadily and surely. What says Mr. von Halle, fresh from his study of the subject in its most recent development in the United States?

"While theorists still discuss the advisability, lawyers attack the legality, and politicians doubt the constitutionality of the principle of combination, we learn daily of formation of new combines throughout the civilized world. This seems somewhat to discredit the cheerful hopefulness of the believers in the orthodox teaching that combinations are nothing but temporary aberrations from the natural law of free competition. At the same time, it becomes evident that mere legal prohibition has proved neither successful nor productive of any satisfactory results. Men who were among the strongest opponents of all sorts of combinations a few years ago now officially admit them to be in certain instances the lesser evil."⁵⁷

The tendency of the doctrine of property affected with a public interest seems, then, to be rather to support the individualist than the socialist, and I venture to suggest that those who oppose it on the ground of its socialistic tendency have mistaken its bearing.

The error may perhaps have arisen from the line of argument taken by the Court in the opinion, a line which, as I have tried to show, was neither applicable to the facts nor sustained by the authorities cited in its support.

⁵⁶ Yale Law Journal, March, 1895, p. 136.

⁵⁷ Introduction, pp. ix-x.

The mistake seems to lie in assuming that the public interest is created by the *benefit* conferred. Justice Field says in the case:

"This Court seems to hold that property loses something of its private character when employed in such a way as to be generally useful." And Justice Brewer says: "I cannot bring myself to believe that when the owner of property has by his industry, skill, and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full dominion over it which he had when it was of comparatively little value; nor can I believe that the control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it."⁵⁸

If this were the principle, the doctrine would undoubtedly be socialistic, for it would sanction the doctrine that when the benefit to the public created by a private business became sufficiently large, the public might claim an interest in it to the detriment of the owner.

But it is suggested that in this case the public interest was not created by the *benefit* derived from the business, but by the *injury* resulting from it. The exact words used were: "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use." These words, taken alone, might favor the construction put upon them by the dissentients, but when considered in connection with other expressions in the opinion, their more natural meaning would appear adverse to it. Thus:

"A member of a body politic necessarily parts with some rights or privileges, which, as an individual not affected by his relations to others, he might retain. This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize laws requiring each citizen to so use his property as not unnecessarily to injure another."

And later on: "The grain elevator business in Chicago was, or might be, a virtual monopoly, and this notwithstanding its vast importance. The business, therefore, if any business can be, was clothed with a public interest, and ceased to be *juris privati*."

From this it would certainly appear that the right to regulate was derived from the injury caused by the monopoly to the public at large. And this view is sustained by the language used by Justice Bradley, one of the majority, as quoted by Justice Brewer.

⁵⁸ Budd v. N. Y., 143 U. S. 517.

"The inquiry there (in *Munn v. Ill.*) was as to the extent of the Police Power in cases where the public interest is affected, and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen, in other words, when it becomes a practical monopoly to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the Police Power."⁵⁹

And according to the ideas generally prevalent, it may be asserted that on this principle a like decision would meet with general approval if a monopoly were created in any other business which affected the masses of the people. To refer again to Justice Brewer: "Surely the matters in which the public has the most interest are the supplies of food and clothing. Yet can it be that by reason of this interest the State may fix the price at which the butcher may sell his meat, or the vendor of boots and shoes his goods?"⁶⁰

I do not hesitate to assert that if a monopoly were created in these articles, a demand for State interference would be too universal to be resisted.

I draw, then, the conclusion that the tendency of this decision, founded as it seems to me to be on an injury to the rights of the public, and designed as it is to prevent the destruction of competition by monopoly, is opposed to the principles of socialism, and is an effort of the opposing party to stop the advance of its enemy.

My first ground for this conclusion, as shown above, is that the legislation in question was against monopoly and therefore in support of free competition.

My second ground is that the *benefit* to the public is not the basis of the power to regulate, but the *injury* to the public.

On this latter ground, there is no taking away from anyone that which he has honestly acquired by his skill, foresight, energy, and industry. It is an action by the public to preserve its members from threatened injury. "There is no attempt," says Chief Justice Waite, "to compel these owners to grant the public an interest in the property but to declare their obligations if they use it in this particular manner."

It is now nearly twenty years since this decision was made, and if, as it seems to me, its intention was to support the old ideas in favor of individualism and against monopolies, has it succeeded?

⁵⁹ *Brass v. Stoeser*, 153 U. S. 391.

⁶⁰ *Budd v. N. Y.*, 143 U. S. 517.

The answer must be, I think, no. If it has not succeeded, it is not because of the want of legislation in its favor. Laws have been passed, constitutional provisions have been made continually to prevent the further development of monopoly, and to preserve the principle of free competition in all its vigor. But despite them all, the opposite principle makes more headway each year, bringing over to its side, as Mr. von Halle says, many of those who formerly opposed it. The day of small things seems to have gone by, and the struggle of the individualist against combination appears to be growing weaker. It is not necessary to illustrate this by examples. The fact is patent to anyone who reads a newspaper. The ideas of men are changing, and the constantly recurring industrial difficulties, the more frequent depressions in trade, over-production, diminution of profits, difficulties with artisans, strikes, and the universal uncertainty and gloom cause many to doubt the everlasting truth of the principles they have heretofore held.

Mr. von Halle says:

"In the United States public opinion has to decide finally about the meaning and nature of things. It will not be able, in the long run, to lean upon mere theories and maxims, it will be forced by the actual development to undergo changes, to reform and remodel itself in correspondence with the great laws of historical progress. The old ideas about the infallibility and exclusive desirability of individual and unrestricted activity have begun to fade. The masses still adhere to them, and are supported therein by the newspapers and politicians who prefer popularity to thoroughness or thought, and by the cheap economics of old-fashioned every-day economists, who are not able to perceive that since the time of their youth there has been any change or progress in practical life, as well as in the scientific interpretation of it. But whosoever tries to understand the times, at once perceives the different character of modern problems, and the necessity of new standards of judgment."⁶¹

In what this tendency will result I do not dare to say. At present it seems to be one that is so powerful that it is not controllable by any of the forces brought against it by those who oppose and fear it.

In "Looking Backward," the stupendous social change imagined is founded on the development of the principle of Trusts and Combinations, which are supposed by the author to have

⁶¹ p. 142.

educated the people in the principle that competition is destruction, and that in combination lay the remedy for our social troubles. He shows how the great corporations and trusts passed through a time of desperate popular opposition, but going on their way unchecked by the clamor against them, they finally absorbed all the small capitalists in the country. By their action they had educated the whole mass of the people into seeing that these gigantic affairs had been directed with an efficiency and economy unattainable in small operations, and that the larger the business the simpler the principles that can be applied to it.

"Thus it came about that, thanks to the corporations themselves, when it was proposed that the nation should assume their functions, the suggestion implied nothing which seemed impracticable even to the timid."⁶²

It is curious to place side by side with the vision of the dreamer of ten years ago the conclusion of the practical inquirer of to-day. Says Mr. von Halle: "It is my belief that the future belongs neither to the prophets of individualism, nor to the ideals of the social democrats. Its next phases belong to social reorganization. And the probability is that this will show a corporate character, and will be sustained and controlled by public supervision."

Whether the present tendency to combination is to have permanent and far-reaching results destined to change the whole social organization of the civilized world, or whether it is but a temporary phase of feeling arising from the weariness and sense of weakness and helplessness born of the keen and embittered struggle for existence in which the modern world is engaged, I cannot pretend to decide.

But that the tendency exists is not to be denied, and it is rather because of its opposition to this tendency of the times than because of its failure to command assent from the legal profession that I look for the ultimate reversal of the decision that I have been discussing in this essay.

W. Frederic Foster.

⁶² "Looking Backward," p. 58.